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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 185

ERNEST JOSEPH GIBAS, DONALD DOWD FULTON AND MICHAEL EMMETT BYRNE, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a-16a) is reported at 300 F. 2d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1962 (Pet. App. 17a). A petition for a rehearing was denied on April 17, 1962. On May 14, 1962, an order by MR. JUSTICE CLARK extended the time for filing a petition for a writ of certiorari to and in-

cluding June 16, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction of petitioner Bryne as a labor union representative for conspiracy to accept money unlawfully from contractors employing union laborers in an industry affecting interstate commerce.

2. Whether the trial court properly instructed that there was no evidence that any payment made by an employer came within any of the five statutory exceptions listed in Section 302(c) of the Labor Management Relations Act of 1948.

3. Whether the court properly instructed that the word "willfully" under Section 302(d) of the Act means knowingly and intentionally committing acts constituting the offenses charged without requiring knowledge that such acts are in fact prohibited by law.

4. Whether the court properly instructed that there could be a violation of Section 302(b) of the Act without proof that the employers had employees who were union members at the moment of receipt of the money, if the employers, in the course of their business, regularly employed men who were union members.

STATUTES INVOLVED

The Labor Management Relations Act of 1947, 61 Stat. 136, 157, 29 U.S.C. 141, *et seq.*, as of the time of the offenses charged, provided as follows:

Restrictions on Payments to Employee Representatives

Sec. 302 [29 U.S.C. 186]. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or

commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the

representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *

18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Count I of an indictment returned in the United States District Court for the Northern District of Illinois charged a conspiracy between petitioner Gibas, business manager and financial secretary-treasurer of Machinery Movers, Riggers and Machinery Erectors, Local Union 136 (hereinafter called Local 136), petitioners Fulton and Byrne, business representatives of Local 136, and unknown persons, unlawfully to receive and accept, and agree to receive and accept, money from contractors employing members of Local 136 in an industry affecting interstate commerce (R. 3-8). Each substantive count alleged that a named contractor-employer was engaged in interstate commerce; that certain of his employees were members of Local 136; and that the defendant named therein was a representative and official of Local 136, who on a specified date received and accepted a specific sum of money

from the contractor-employer in violation of 29 U.S.C. 186(b) (supra, p. 3) (R. 8-65). All three petitioners were found guilty by the jury on the conspiracy count; Gibas was found guilty on Counts II through VI, IX through XIV, XVI, XVII, and XXVIII through XLVIII; Fulton was found guilty on Counts XVIII through XXII and on Count XLIX; and Byrne was found guilty on Count L (R. 538). Gibas was sentenced to imprisonment for a total of six years and fines of $8,000 (R. 557-558); Fulton to one year and fines of $3,000 (R. 559-560); and Byrne to one year and a $1,000 fine (R. 561-562). On appeal by all three petitioners (R. 563-564), the convictions were affirmed (Pet. App. 17a).

1. *The conspiracy*—The evidence relates to a number of contractor-employers engaged in the business of moving heavy machinery, some involving the pick-up of machinery in Illinois for delivery to locations outside to Illinois, and others for delivery in Illinois of machinery shipped to Illinois from other places (R. 72, 73, 115, 150, 151, 202, 212, 213, 214, 301, 302). The employers had some employees who were members of Local 136 (R. 73, 115, 151, 203, 214, 302). The employers would call the hiring hall of Local 136 for workers on particular jobs. Union men would be sent except that sometimes non-union men registered at the hiring hall would be supplied when there were not enough union men available (R. 74, 116, 152, 214, 302, 475).

Employer Tucker was the president of M. Lange, Incorporated (R. 72) and had engaged in the business of moving machinery since 1953 (R. 74). Tagney,

then president of Local 136 (who died in August 1953), had made a loan to Tucker for the purchase of a winch, which Tucker had repaid in 30 days (R. 4, 103-104). In regard to a $1,000 payment Tucker made to Tagney in 1953 (R. 73-76), Tucker gave the following testimony (R. 76-77):

> A. Well, Mr. Tagney offered to sell his interest in the business [Tucker's] for $1,000. Of course, he never had any interest, as far as that was concerned, but I went along with it.
>
> Q. What did you say to his offer to sell the interest in the business for $1,000?
>
> A. I gave him the money.
>
> Q. Was anything said at that time and place about future payments of money?
>
> * * * * *
>
> A. Only until after I had given him the $1,000. Then it was supposed to be $30.00 a month payments.

After Tagney's death, Gibas told Tucker that he knew of his dealings with Tagney and that thereafter the "payments were going to go from $30.00 to $50.00 a month" (R. 84).

Employer Ross stated that shortly before August 31, 1953 Gibas told him that he would be out for the normal check and also wanted the thousand dollars under the agreement Ross had with Tagney. Ross testified, "The agreement that I had with Mr. Tagney at the time that I began hiring machinery movers was

that I would have to pay him a thousand dollars on them plus five cents an hour for each machinery mover that worked, plus a thousand dollars if I received the second contract in August" (R. 122-123). Employer Gorter testified that he had been introduced to Gibas by Tagney who said that "Mr. Gibas would take over after this" (R. 304). Gorter thereafter made payments to Gibas (R. 306).

On October 12, 1956, employer Koshen, at dinner with Fulton and Byrne, discussed the hiring of men from Local 136 for a General Motors job. Fulton had said he was not too favorable to letting Koshen have any men (R. 179, 181). While Fulton had left the table to telephone, Byrne said to Koshen, "Well, it is quite a big job over there. You know, we are poor people. That job ought to be worth $12,000." Koshen said they were not speaking the same language and changed the conversation (R. 181-182). When Fulton went into the restroom with Koshen, Koshen gave him $200 and said, "Here, take care of yourself." Fulton asked, "Is that for all three of us?" and Koshen replied, "Yes, sir." On the following Monday, Koshen got the men he needed for the job (R. 182-183).

2. *The substantive offenses*—The evidence showed payments to Gibas to get men on the job by contractor-employers Rodseth (R. 156-157), Ross (R. 121-122, 131, 134), Helders (R. 203-204), Gorter (R. 305, 306, 310, 327-332), Tucker (R. 78, 85-89) and Masek (R. 218-222). It also disclosed similar payments to Fulton by contractor-employers Gorter (R. 332-334) and Masek (R. 223).

As to Count L charging an illegal payment to Byrne (R. 64-65), the evidence showed that Byrne telephoned Masek and said that he was working short-handed on the Mall Tool job and would have to get more men on it. Masek told Byrne that he would see Gibas and straighten the matter out with him. Masek gave Gibas a $100 check payable to cash dated December 10, 1957 (Gov. Ex. 50-1, R. 223-225). The endorsement on the check showed that it was deposited to the credit of Local 136 (R. 254, 255). The check stub (Gov. Ex. 50-2) and the memorandum to a tax consultant (Gov. Ex. 50-3) referred to "comm. on Mall Tool job" for "Mike Burns."

ARGUMENT

1. There is no merit to petitioner Byrne's contention that the evidence was insufficient to support his conviction on the conspiracy count (Pet. 16-20). Since the court below found the conspiracy evidence sufficient, it properly affirmed on that count alone without finding it necessary to consider the sufficiency of the evidence on the substantive count L. See *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Lawn* v. *United States*, 355 U.S. 339, 359.

This is not a case like *Ingram* v. *United States*, 360 U.S. 672, or *United States* v. *Falcone*, 311 U.S. 205, in which some defendants were held not guilty of conspiracy because they did not have knowledge of its purpose. Here there was sufficient evidence of Byrne's participation in the conspiracy from which the jury could reasonably infer his knowledge. Cf. *Glasser* v. *United States*, 315 U.S. 60, 80; *Delli Paoli* v. *United*

States, 352 U.S. 232, 236. Byrne's knowledge could be inferred both from the incident of October 12, 1956, involving Koshen, and from the Masek check dated December 10, 1957, which was also the subject of Count L (see Statement, *supra*, pp. 9-10).

After Koshen was led to believe it was going to be difficult for him to get men, Byrne virtually invited him to make an illegal payment with the statement, "Well, it is quite a big job over there. You know, we are poor people. That job ought to be worth $12,000" (R. 182). Use of the word "we" indicated that Byrne was in the conspiracy together with Fulton and Gibas. And when, shortly after Byrne's invitation, Koshen made the $200 payment to Fulton in the restroom, Koshen indicated that the payment was for "all three" of the conspirators. In the other incident involving the $100 Masek check dated December 10, 1957, it was Byrne who telephoned Masek that he would have to get more men on the Mall Tool job, after which Masek "straightened it out" with Gibas, as he told Byrne he would, by delivering the check to Gibas. It was not an unreasonable inference that Byrne obtained the proceeds from this check by having it channeled through Local 136. At the very least, this incident shows a sufficient dovetailing of the activities of Byrne and Gibas to justify the jury's conclusion that Byrne was actively assisting in the scheme for obtaining improper payments from employers.

2. The judge refused to submit to the jury, as requested by petitioners, the issue of whether the payments charged in the indictment fell within any of the five statutory exceptions in Section 203(c) (*supra*, p. 3).

In explaining the statute the judge mentioned the exceptions and told the jury (R. 525-526):

> There was no evidence presented at this trial indicating that any payment made by any employer was of the nature of any of said statutory exceptions.

Petitioner argued that this was not a matter of law to be ruled on by the Court (R. 496).[1]

The statement of the judge was, however, factually correct. Petitioners base their argument on the fact that a number of the checks introduced in evidence bore on their face a purported statement of purpose, such as "commission for securing job" or "payment for permit" (See Pet. App. E). But in each instance, the government's evidence had specifically shown that the check was in fact simply a payment to the defendant named, and petitioners offered no evidence of any kind to substantiate the notation on the check. Moreover, even taking the notations at face value, they do not fall within the exceptions of Section 302(c). As to the alleged "commissions" (Counts III-V, XLIX, Pet. App. 18a, 25a), there was nothing to show that they were for "services as an employee of such employer" within the first exception to Section 302, the only one under which they might conceivably fall. As to the notations reciting "payment for buying out business interest" on Tucker's checks (Counts XXVII-XXXVIII, Pet. App. 20a-22a), besides the lack of evi-

[1] We do not argue that this was inadequate to preserve an exception.

dence showing an initial sale of the business by Gibas to Tucker, there was certainly no evidence that the alleged resale was made "at the prevailing market price in the regular course of business" under the third exception set out in Section 302(c). The claim that certain payments were for union dues (Counts XVI, XVII, Pet. App. 20a; XLIV, XLVIII, Pet. App. 23a-24a) does not show an exception under subdivision (4) since there was no evidence that the required written authorization from any employees to deduct union dues had been obtained. Nor do the alleged "fine" (Count II, Pet. App. 18a) or the alleged "settlement of union grievance" (Count L, Pet. App. 25a) satisfy the second exception which requires proof of a settlement in the absence of fraud or duress, the only proof here being of duress. Thus, the notations on the checks in themselves were not even slight evidence that the payments in this case fell within the statutory exceptions, and since this was the only proof possibly pointing in that direction, the judge properly told the jury that there was no evidence that the payments fell within the statutory exceptions. A judge is not required to submit to the jury a theory which has no evidence to support it. E.g., *United States* v. *Gross*, 286 F. 2d 59, 61 (C.A. 2), certiorari denied, 366 U.S. 935; *Bianchi* v. *United States*, 219 F. 2d 182, 192-193 (C.A. 8), certiorari denied, 349 U.S. 915; *Callanan* v. *United States*, 223 F. 2d 171, 176-177 (C.A. 8), certiorari denied, 350 U.S. 862.

3. Contrary to petitioner's contention (Pet. 22-23), the court properly instructed the jury that the word "willfully" under Section 302(d) of the Act required a finding that petitioners knowingly and intentionally

made the payments charged, and that it was not necessary that they have knowledge that such acts were in fact prohibited by law (R. 530-531).

This court in *United States* v. *Ryan*, 350 U.S. 299, 305, observed as to Section 302, "As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." Instructions similar to those given here have been upheld. *E.g.*, *Brennan* v. *United States*, 240 F. 2d 253, 265 (C.A. 8), certiorari denied, 353 U.S. 931; *Korholz* v. *United States*, 269 F. 2d 897 (C.A. 10), certiorari denied, 361 U.S. 929.[2]

4. Petitioners point to certain isolated instances in which it was not specifically shown that at the exact time of payment the employer then had employees who were members of Local 136. They say (Pet. 24) the count erred in instructing that it was unimportant whether the various companies had employees who were union members at the precise moment of receipt of the money, but that it was sufficient if in the employers' course of business they regularly employed members of Local 136 (R. 527).

The instruction is in keeping with the central pur-

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[2] *Lambert* v. *California*, 355 U.S. 225, striking down as a violation of the 14th Amendment a Los Angeles ordinance making it an offense for a convicted felon to remain in the city more than five days without registration with the police where the accused had no knowledge of the duty to register, is not in point. Unlike *Lambert*, where the accused had no knowledge of the violation and her conduct was merely passive failure to register, here the jury was required to find that the petitioners knowingly and intentionally made the illegal payments forming the basis of their convictions.

pose of the statute—to keep the processes of collective bargaining unsullied by special dealings. See *United States* v. *Ryan*, 350 U.S. 299. Section 302(b) is violated if money is paid by an employer to a representative of employees shown to have been employed by the employer during the span of time covered by the indictment. There is no requirement, express or implied, that the employer must have employees working for him at the precise moment of payment. An instruction of similar import was approved in *United States* v. *Pecora*, 267 F. 2d 512, 514 (C.A. 3), where it appeared that workers on a highway project were not working on the particular date of the prescribed payment but that their employment had not been permanently terminated. Here, there was ample evidence that during the general period covering payments to petitioners the various employers had numerous employees who were members of Local 136 (R. 73, 115, 151, 203, 214, 302).[3]

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[3] Petitioner's reliance upon *Ventimiglia* v. *United States*, 242 F. 2d 620 (C.A. 4) is misplaced. In *Ventimiglia* the basis for reversal of the conviction for conspiracy to violate Section 302(a) of the Act was the fact that the union business agent to whom unlawful payments were made was not a representative of the defendants' non-union employees. In the instant case, however, petitioners were bona fide representatives of union employees of the various employer-contractors.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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